

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

CITY OF PHILADELPHIA,

“City”

- and -

F.O.P. LODGE NO. 5,

“Union”
-----X

AAA Case No.
14 390 00193 13

Opinion & Award

Re: Discharge of
Gerard Corrento

Hearing: January 29, 2014

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Toi Shields, Esq., Senior Attorney

For the Union

JENNINGS SIGMOND, P.C.
Moir McGuire Kulik, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Department discharged Police Officer Gerard Corrento effective January 24, 2013. It took this action based on one charge of Conduct Unbecoming an Officer, alleging Corrento violated Department Disciplinary Code Section 1-§010-10 by making a false entry in a Department record or report; namely, his submission of allegedly fraudulent doctor's notes to have sick leave absences excused. (Joint Exhibits 2 & 3.)¹ The Union contends the City lacked just cause to impose this discipline. It asks that Corrento be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly:

At the time of his discharge, Corrento had been a member of the Department for nearly nine years. His record of active prior discipline concerned his excessive use of sick leave as described below.

Department Directive 66 addresses the use of paid sick leave as provided for by the parties' collective bargaining agreement (the "Agreement"). (Joint Exhibit 1.) Captain D [REDACTED] B [REDACTED], the commanding officer of the 18th District where Corrento was assigned, testified that the Directive defines the excessive use of sick leave as taking eight undocumented sick days within a calendar year (i.e., without a medical certificate). He related that under the Directive, an officer who takes excessive sick leave is placed on

¹ The Union represents that it has not accepted the current Disciplinary Code, but maintains instead that the Department implemented it unilaterally in 2010. It notes that the implementation of the Code is the subject of an unfair labor practice charge pending before the Pennsylvania Labor Relations Board. In addition, it points out that the Act 111 Board of Arbitration has ruled that notwithstanding the terms of the Code, disciplinary arbitrators are empowered to determine the appropriateness of the penalty imposed by the City in any instance in which just cause to discipline is found.

the sick leave abuse list and is subject to progressive discipline for each subsequent use of sick leave for which he/she fails to provide a medical certificate or doctor's note confirming treatment. The system of progressive discipline consists of five steps, beginning with a written warning and culminating with discharge.

He recounted that prior to discharge, Corrento had been placed on the sick leave abuse list. Further, he reported, that during 2012, Corrento was disciplined multiple times for undocumented sick leave, reaching step four of the system of progressive discipline (i.e., 10-day suspension). (City Exhibit 3.)²

The circumstances leading to Corrento's discharge arose from a complaint filed with the Department's Internal Affairs Division ("IAD") by his estranged wife, K [REDACTED] C [REDACTED], alleging, among other matters, that he had submitted false "sick notes" obtained from his girlfriend, A [REDACTED] L [REDACTED], who works at a doctor's office.

Lieutenant John Evans, the IAD member assigned to investigate this complaint, testified that he interviewed A [REDACTED] L [REDACTED] on two occasions concerning the doctor's notes at issue, which are on the letterhead of Wissinoming Medical Associates ("WMA") and dated [REDACTED] and [REDACTED] (City Exhibits 1 & 2.)³ He recounted that L [REDACTED] who is employed as a medical assistant at WMA, confirmed preparing and signing⁴ both notes and supplying them to Corrento, who she described as her boyfriend. She

² Corrento testified that his absenteeism stemmed from the stress and depression he was then experiencing due to ongoing marital difficulties. He reported that he sought medical treatment [REDACTED] [REDACTED]. He also requested a shift change, believing that it would help to alleviate his attendance problems. However, this request was denied.

³ The body of each note is an identical pre-printed form, which states, "The above patient was under my care from . . . and will be able to return to work on . . .," and contains blanks to insert the patient's name, relevant dates, diagnosis and comments. (City Exhibits 1 & 2.)

⁴ L [REDACTED] signed both notes "Mitchell A. Schwartzman, D.O." and placed her initials alongside the signature. (City Exhibits 1 & 2.)

acknowledged that the doctor did not see or treat Corrento on either occasion. According to Evans, she explained that it is WMA's practice, upon request, to issue doctor's notes of this type to patients who have a scheduled appointment regardless of whether they have yet been seen by the doctor.

Evans reported that he also interviewed A [REDACTED] M [REDACTED] C [REDACTED], WMA's [REDACTED] [REDACTED]. He recalled that after showing her copies of the doctor's notes in question, she confirmed that L [REDACTED] is authorized to sign such notes in her capacity as a medical assistant. She advised that while there is no written policy, it is not WMA's practice to issue such notes to patients who have not been seen by the doctor. She also reported that Corrento was a patient of WMA and was seen by a doctor there on [REDACTED]⁵

Finally, Evans recounted his interview of Corrento. According to Evans, when questioned, Corrento admitted he had not been seen by a doctor at WMA in connection with the issuance of either doctor's note, but reported seeing a doctor there sometime in [REDACTED]. He also stated that in securing these notes, he asked L [REDACTED] "to do him a favor" because he was on the sick leave abuse list and would be in "trouble" if he failed to submit a doctor's note in connection with his absences.

In her testimony, L [REDACTED] confirmed the statements attributed to her by Evans. She also reported issuing similar doctor's notes for other patients of WMA who had not yet been seen by a doctor. However, she could not recall the frequency with which she had done so. She averred that in providing Corrento with the doctor's notes at issue, she was not "doing him a favor." Instead, she did so as a matter of practice in performing her job duties at WMA.

⁵ C [REDACTED] did not testify at the hearing in this case. Therefore, Evans' testimony concerning his interview of C [REDACTED] is received only as proof of his investigatory process, and not for the truth of the statements attributed to C [REDACTED].

Corrento testified as well that he had not been seen by a doctor at WMA in connection with either of the doctor's notes at issue. He related that on both occasions, he simply went there, obtained the note from L [REDACTED], and thereafter delivered it to the operations room supervisor at the 18th District. He asserted, however, that on both occasions (i.e., [REDACTED]), he was ill, but did not require emergency medical treatment.

Evans testified that on the basis of his investigation, he concluded that Corrento was guilty of submitting fraudulent doctor's notes. He explained that in submitting the notes, Corrento sought to have his use of sick leave excused per Directive 66 by showing he had been treated by a doctor on the dates in question. However, the investigation revealed that Corrento had received no medical treatment on those dates.

On November 5, 2012, IAD issued a report to Commissioner Charles Ramsey summarizing Evan's investigation and stating his finding. (Union Exhibit 1.)

On December 6, 2012, the Department formally charged Corrento with violating Disciplinary Code Section 1-§010-10 (i.e., making a false entry in any Department record or report). The Statement of Charges specifies that the IAD investigation substantiated he had "submitted fraudulent sick notes to cover sick leave absences from work." (City Exhibit 3.) After being advised of his right to counsel, Corrento signed the Statement of Charges indicating that he was pleading guilty and waiving a hearing.

Ramsey, in turn, concluded that Corrento should be discharged for this offense, and implemented that decision by a Commissioner's Direct Action effective January 24, 2013. (Joint Exhibit 2.) Ramsey testified that this level of discipline was warranted because Corrento's transgressions demonstrate he lacks the requisite integrity to serve as

a police officer. His conduct, Ramsey explained, represented an effort to evade the disciplinary consequences of being on the sick leave abuse list by submitting sick notes falsely stating that he had been under a doctor's care while absent from work.⁶

Corrento's discharge prompted the instant grievance. When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing in this case on January 29, 2014, at the offices of American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer Gerard Corrento, effective January 24, 2013?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its discharge of Corrento was for just cause. It maintains that the evidence conclusively demonstrates that he is guilty of the charged offense.

⁶ Ramsey stated that he has discharged other officers for this same offense. John McGrody testified that in his capacity as Union Vice President with responsibility for grievance and arbitration matters, he is aware of only two other officers being discharged for this reason, and arbitrations are pending in both cases.

It avers that the testimony shows Corrento made a false entry in a Department record. Specifically, he did so by submitting fraudulent doctor's notes to the operations room supervisor for entry into the Department's system. It submits that there can be no dispute that the doctor's notes at issue were fraudulent. Indeed, it notes that Corrento's own words confirm this fact. It highlights in this regard Corrento's statement to IAD that L ■■■ had given him the notes as "a favor," as well as his acknowledgement that he had not been seen by the doctor in connection with either note. It also cites his guilty plea to the Charge.

In sum, it maintains. Corrento sought to evade the disciplinary consequences of being on the sick leave abuse list by obtaining doctor's notes from L ■■■ falsely stating that he had been under a doctor's care on dates he was absent from work claiming sick leave.

Further, it argues that the penalty of discharge is appropriate here. It reasons that it is within the range prescribed for this offense, and is clearly warranted based upon the surrounding circumstances.

Accordingly, for all these reasons, the City asks that Corrento's discharge be sustained and the Union's grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge Corrento. It submits that the City has failed to meet its burden of demonstrating that Corrento is guilty of the charged offense.

As a preliminary matter, it argues that contrary to the Notice of Dismissal, the alleged submission of fraudulent doctor's notes was not the actual reason for Corrento's discharge. Instead, it contends, the City discharged him for failing to comply with the

requirements of Directive 66. It reasons that this conclusion logically follows from the testimony of the City's witnesses, including Ramsey, which focused so heavily on Directive 66 and Corrento's excessive use of sick leave.

Simply put, it concludes, the City terminated Corrento because he was at the fifth step of discipline for abuse of sick leave for which the penalty is discharge. Having failed to charge him with this offense, the City, it submits, lacked just cause to discharge him for this reason.

In any event, it asserts that the City has failed to prove that the doctor's notes at issue were fraudulent. To the contrary, it maintains that L's testimony confirms that she was authorized to issue these notes and had issued such notes for other patients under similar circumstances. Further, Evans' account of his interview of C WMA's, corroborates L's representations in this regard. Finally, it stresses that Corrento kept the appointment that he had scheduled with WMA at the time he requested these doctor's notes.

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

Opinion

The Department certainly has a right to expect its officers will conduct themselves honestly in all aspects of their employment. Indeed, this expectation is reflective of the fundamental duty of honesty that all employees owe as a basic condition of employment. It necessarily follows that an employee who breaches this obligation can and should expect that substantial discipline will result.

However, even when charged with the breach of such a fundamental duty, the employee is entitled to the presumption of innocence. The employee need not prove his/her lack of guilt. Instead, it is the employer that must shoulder the burden of establishing by the weight of the credible evidence that the employee is guilty of the charged misconduct. The employer must also prove the measure of discipline imposed is appropriate.

The Charge against Corrento alleges that he made false entries in a Department record by submitting fraudulent doctor's notes to excuse or "cover" his sick leave absences on [REDACTED]. On review, the record convinces me that he committed these offenses. My reasons for this conclusion follow.

It stands undisputed that as of March 2012, Corrento was on the Department's sick leave abuse list, and, as a result, was subject to progressive discipline for each subsequent undocumented use of sick leave. The documentation required to excuse or "cover" his sick leave use was a doctor's note confirming he received treatment on the date of the absence.

I conclude that the doctor's notes that he submitted to excuse his use of sick leave on [REDACTED] were, in fact, fraudulent. In reaching this conclusion, I recognize that it stands un rebutted that L [REDACTED] was authorized to issue these notes. I find, however, that this fact does not terminate the requisite analysis nor absolve Corrento. Instead, there must also be an examination of the notes themselves and the use to which Corrento put them. Such review confirms his misconduct.

Both notes state that Corrento was under the care of Dr. Mitchell Schwartzman on the dates specified, which he concedes was not true. In fact, by his own admission, he

[REDACTED] until well after these notes had been issued. Moreover, the evidence establishes that he submitted these notes in order to represent that he had been treated by Dr. Schwartzman on the dates in question and thereby excuse himself from discipline under Directive 66. Examined in this light, I am compelled to conclude that the doctor's notes at issue were fraudulent in that Corrento submitted them for the sole purpose of deceiving the Department.

Indeed, by pleading guilty to the Charge, Corrento has confirmed these findings. I consider his efforts to explain away his guilty plea entirely unconvincing. His claim that he was pleading guilty to submitting the doctor's notes, but not the allegation that the notes were fraudulent, defies credulity. The Charge very clearly identifies the alleged misconduct as the making of a false entry by submission of fraudulent doctor's notes. Indeed, but for the allegation that the doctor's notes were fraudulent, there would have been no basis for the Charge and no reason for him to enter a guilty plea.

In sum, regardless of WMA's lax practice relative to issuing doctor's notes, it does not alter the fact that Corrento submitted the doctor's notes in question to the Department knowing their content to be untrue in order to excuse his absences. Such intentional deception falls within the very definition of fraud.

Having found Corrento guilty of the Charge, there remains only the issue of whether discharge is the appropriate penalty for that offense.⁷

There can be no doubt that an employee's submission of fraudulent documents to his/her employer is a very egregious offense. Indeed, by engaging in such conduct, an

⁷ I am not persuaded by the Union's claim that the City discharged Corrento for violating Directive 66 and not for submitting fraudulent doctor's notes. The witness testimony concerning Directive 66 does not show otherwise. I considered such testimony to have been presented for the purpose of providing context for Corrento's submission of the fraudulent doctor's notes.

employee breaches the basic trust that is fundamental and critical to the employment relationship. For this reason, discharge is not an inappropriate penalty for such misconduct. On review, I conclude that it is warranted in this case.

In reaching this decision, I am mindful of Corrento's tenure with the Department and relatively clean disciplinary record but for attendance issues. However, I do not find these factors sufficient to mitigate the penalty of discharge in this case. His actions did not amount to a mere error of judgment that occurred in the heat of the moment. Rather, they represent a very deliberate and willful choice on his part. He made a conscious decision, not once, but twice, to obtain a doctor's note from his girlfriend L [REDACTED] which falsely stated he had been under a doctor's care, and then submitted those notes to the Department to excuse his absences for the obvious purpose of avoiding disciplinary action. As such, he must now accept the consequences of that misconduct, namely discharge.

Accordingly, for all these reasons, the Union's grievance is denied.

AWARD

1. The City had just cause to discharge Gerard Corrento, effective January 24, 2013.
2. The grievance is denied.

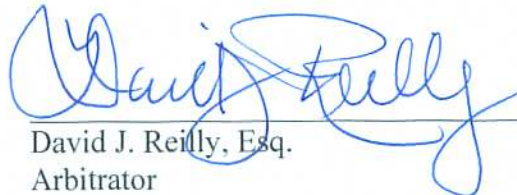
February 27, 2014


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

February 27, 2014


David J. Reilly, Esq.
Arbitrator